BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

JAMES SUMMERS
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-151
Case No. 72-5332

S.S.A. No.

DEPARTMENT OF HUMAN
RESOURCES DEVELOPMENT

The Department appealed from Referee's Decision No. SJ-11023 which held that the claimant was entitled to benefits under section 1253(c) of the Unemployment Insurance Code. Written argument has been received from the Department. The claimant did not file written argument.

STATEMENT OF FACTS

The claimant was last employed in May 1972 as a car-lot attendant. This work involved driving and delivering automobiles to customers of a used car lot. Prior to his military service which ended in March 1971, he had worked in a car wash and in restaurants.

The claimant filed a claim for benefits effective May 21, 1972. On or about May 23, 1972 he was advised by the Department that his hairstyle would affect his eligibility for benefits and that if he would cut his hair he would be found eligible on his next report day. The claimant declined to cut his hair.

The claimant's hair is parted in the middle and extends below his collar. His ears are exposed. He has sideburns which extend one inch below the earlobes and wears a small mustache. He decided to let his hair grow after his discharge from the military service because he likes its appearance.

At the hearing before the referee, evidence was introduced of a portion of a survey of employers conducted by the San Jose office of the Department in May 1971. That portion covered employers in the fields of janitorial service, department store sales, automobile dealership sales and used car sales. The survey was conducted by means of a questionnaire sent to employers of ten or more employees. The portion of the survey introduced into evidence was selected by the Department upon the basis that the claimant was either seeking work in those fields or his work experience, including his military service, fitted him for work in those fields. From 70 percent to 97 percent of the employers in those fields who responded to the questionnaire indicated that the longest hairstyle that they would accept for a new male employee would be a style which was trimmed at the neck and ears. In the four fields mentioned, a total of 94 employers responded, representing a work force of 10,606 employees.

REASONS FOR DECISION

Section 1253(c) of the Unemployment Insurance Code provides that a claimant is eligible to receive benefits with respect to any week only if he was able to work and available for work for that week.

In Appeals Board Decision No. P-B-121, we held in a virtually identical case that a claimant was not available for work where his chosen hairstyle materially reduced his labor market. Our holding was based upon a similar survey by the Department in the Oroville area. We held that insofar as the claimant in that case was concerned constitutional rights were not involved and in doing so we cited and relied upon Spangler v. California Unemployment Insurance Appeals Board, et al. (1971), 14 C. A. 3rd 284, 92 Cal. Rptr. 266.

In the case before us, the referee in holding the claimant eligible for benefits under section 1253(c) of the code cited and relied upon King v. California Unemployment Insurance Appeals Board, 25 Cal. App. 3rd 199, 101 Cal. Rptr. 660. However, the court in the King case expressly limited its holding in the following language found at 25 Cal. App. 3rd 206:

"Our decision goes no further than to acknowledge that the state is constitutionally

> inhibited from denying unemployment compensation benefits to an applicant who has been discharged from employment because of personal action which is constitutionally protected; we neither hold nor suggest that a bearded person has a constitutional right to a job, and we do not reach or affect a private employer's right to manage its own business. . . ."

Since the decision in the King case, the same District Court of Appeal held that an employer has a right to protect its business image and that an employee discharged for failure to comply with the employer's reasonable rules concerning length and style of hair was discharged for misconduct (McCrae v. California Unemployment Insurance Appeals Board, District Court of Appeal, First Appellate District, Division 3, 1 Civil 30620, as yet unpublished). The McCrae case is the same case as Appeals Board Decision No. P-B-87 and has been certified for publication.

The King and McCrae cases involve the same issue and may be considered somewhat inconsistent. The McCrae case definitely modifies the King decision and finds that a claimant's right to wear his hair in any manner he chooses is not absolute. The court points out that the employer also has certain rights and constitutional protections. However, neither case purports to overrule or modify the Spangler case in any way. The Spangler case dealt with the completely different issue of availability for work under section 1253(c) of the code, the issue under consideration in this case. The King and McCrae cases concerned discharges for misconduct under section 1256 of the code. Consequently, we conclude that the rationale of the Spangler case applies to the instant case and the referee erred when he disregarded that case and looked only to the King case for precedent and guidance.

In the Spangler case the court explicitly states at 14 Cal. App. 3rd 287:

> "No one disputes the appellant's right in the context of this controversy to dress and groom himself as he pleases. No constitutional issue is involved here. Public employment is not involved. But appellant has no constitutional right to unemployment compensation paid

> by former employers if his sartorial eccentricities or sloppy grooming chill his employment prospects, and he voluntarily refuses reasonable accommodation to meet the demands of the labor market. . . ." (Emphasis added)

A 1971 federal court decision lends weight to our belief that the Spangler approach is correct in availability cases. In Galvan v. Catherwood, 324 Fed. Supp. 1016, a three-judge court considered the case of a group of unemployment insurance claimants who had been denied benefits on the ground that they were not available for work after they had moved to Puerto Rico, an area of high persistent unemployment. It was argued on behalf of the claimants that a denial of benefits was a violation of their constitutionally protected right to travel freely. The court recognized the existence of such a right, citing Shapiro, 89 S. Ct. 1329, but held that the state could properly deny benefits under the circumstances. The court stated that the state in denying benefits was not restricting the exercise of the right to travel in any way. As noted below, we are required to give consideration to federal court decisions in the field of unemployment insurance, particularly where they are interpretive of rights protected and/or guaranteed under the Federal Constitution.

In the case before us, we conclude, as we did in Appeals Board Decision No. P-B-121, that the claimant by his deliberate actions has voluntarily and materially reduced his labor market. Hence, he is not available for work and is not eligible for benefits.

We think it proper at this time to comment upon the relationship between our precedent decisions and court decisions.

In past years it was very easy for this board to ascertain and follow judicial precedent. Out of the thousands of cases we decided each year, only about a dozen went to the courts yearly. The courts usually affirmed the board, and if not, the court decision could be readily accepted as precedent. Also, prior to 1967 the board did not have specific authority to create precedent in the unemployment insurance field. Consequently, although the referees looked to the board decisions for precedent, the Department of Employment, later Department of Human Resources Development, did not always do so.

Therefore, court decisions were considered by some people to be the only real precedent in unemployment insurance matters.

In recent years the situation has become far more complicated. The Legislature in 1967 gave this board authority to establish precedent. Section 409 of the code enacted that year provides in substance that the board may designate certain of its decisions precedent, and the referees and the Department shall be controlled by such precedents except as modified by judicial review. The enactment of section 409 took place at about the same time that vast new state and federally funded legal aid programs were being established. Those programs made it possible for almost any individual dissatisfied with a board decision to enter the courts with no expense to himself. This factor along with other reasons too numerous to mention caused a dramatic increase in the amount of litigation.

In unemployment insurance matters litigants do not enter the courts by direct appeal. They do so by means of a petition for a writ of mandate. This action thrusts the board into the role of a litigant. We would prefer to sit back as just an adjudicating agency with decisions under appeal but the system does not permit us to do so. In our role as a litigant, our decisions are under direct attack. We are represented by the Attorney General and we must assume all the duties and responsibilities of any litigant. We are called upon to defend our decisions and sometimes we must appeal. The result is that we take an active part in determining when the litigation is over and judicial precedent, if any, established.

Another important factor pertaining to judicial review of our decisions is the frequency of conflict between the decisions of different state courts, as well as conflict between state courts and federal courts. In fact, this point is illustrated in the instant case where there is some conflict in the reasoning of three panels in the same District Court of Appeal. Thus, we are faced with the problem of determining which judicial interpretation should be followed. This question cannot always be answered by merely stating that we should adopt the latest expression of the court. Frequently, the same issue continues under appeal in different courts, and we must always remember that the federal courts have the final word (California Department of Human Resources Development, et al. v. Java, et al. (1971), 402 U.S. 121) as this area of social legislation is primarily federally controlled and frequently involves federal constitutional issues.

We are aware of the fact that Federal Administrative Boards faced with a similar dilemma as to stare decisis have adopted an attitude of following a court decision in the disposition of the particular case but disregarding it as precedent until the matter is completely settled by a court with nationwide jurisdiction over the subject matter. Typical of this attitude is the approach to the subject by the National Labor Relations Board. That board's decisions are reviewed by ten different United States Courts of Appeal. Each United States Court of Appeal considers only the appeals filed in a particular geographical area consisting of several states. If each United States Court of Appeal adopted a different rule for a particular issue, the board would be faced with making different decisions in each part of the country. Mr. Robert Hickey in his article, Stare Decisis and the National Labor Relations Board, Labor Law Journal Vol. 17, No. 8, Aug. 1966 at P-464, sets forth the National Labor Relations Board's position as follows:

> "Under section 10(f) of the Act, any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in a United States Court of Appeals. If the reviewing court decides against the Board it is bound by the decision in that case. The question is how much weight should be given by the Board to the court of appeal's decision in other cases. The Board has taken the position that when a conflict exists between the court of appeals and the Board over a legal position, it is free to adhere to its own position until reversed by the Supreme Court. (Montgomery Ward and Co. 145 NLRB 846 1964) Despite this position, the Board will usually defer where several courts of appeals have ruled against it."

We are faced with a problem similar to that of the National Labor Relations Board. But in many ways our problem is more difficult. Their decisions are subject to direct appeal. The National Labor Relations Board is usually not a litigant. Further, they need only consider decisions of the United States Courts of Appeal or the United States Supreme Court. We are a litigant, and we must consider decisions in all of the courts, state and federal. We must consider the decisions of all Superior Courts and the various panels of the District

Courts of Appeal. We must keep in mind that each District Court of Appeal receives appeals only from designated counties and therefore does not exercise broad statewide jurisdiction. Further, in the final analysis the statutes, regulations, and court decisions of the Federal Government are controlling. The states lose control of the program if they do not remain in compliance with all federal statutes and regulations (California Department of Human Resources Development v. Java, supra).

As a solution to the problem, we do not propose to adopt the attitude of the National Labor Relations Board and disregard judicial modification of our precedents except by the Supreme Court of California or the federal courts. However, we reserve the right to determine when litigation has ended on a certain issue and when our precedents have been modified by judicial decree. We as litigants in all the cases are the only ones to know the status of litigation on the various issues. The Department and our referees shall follow the precedents we have set forth until such time as we recognize a judicial modification thereof. They should not look to each new court decision for a reason to disregard our precedents. Orderly administration of the program requires such a procedure.

DECISION

The decision of the referee is reversed. The claimant is not eligible for benefits under section 1253(c) of the code.

Sacramento, California, March 8, 1973

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

JOHN B. WEISS

CARL A. BRITSCHGI

EWING HASS

DISSENTING IN PART - Separate Opinion Attached

DON BLEWETT

SEPARATE OPINION

I agree with the statement of my associates of the board that we reserve the right to determine when litigation has ended in a given case and when our precedents have been modified by judicial review.

However, in the instant case I cannot agree that the claimant is ineligible under section 1253(c) of the code. In the first place, I am of the opinion that the Department surveys which were received into evidence are of questionable validity. These surveys were made almost two years ago. In our rapidly changing world, this is a long time when dealing with such ephemeral matters as hairstyles and public acceptance or rejection thereof.

It further appears that employers of less than ten persons were not included in the survey. The claimant's last employer, who had no objection to his hairstyle, would not have been included in this survey. The claimant also testified, without contradiction, that there are many used car lots in the San Jose area which employ less than ten individuals.

I further cannot understand how, if the survey was limited to employers who hire ten people or more, 31 employers in the field of used car sales could employ only 58 persons. I am not satisfied with the Department's explanation that this could have been due to layoffs, particularly since it is apparently only a bit of speculation.

Finally, I dissent upon the basis that the requirements of Spangler have not been met in that there was no showing by the Department that there was employment to be had but for the failure of the claimant to groom himself to the Department's standards. The adequacy of the claimant's search for work has not been questioned. He made numerous personal contacts seeking work, and submitted numerous applications for work. Yet he has not been able to find work.

For these reasons, I would find the claimant eligible for benefits.

DON BLEWETT